given by unauthorized local ordinances and statutes later held unconstitutional. And so, although it is admitted that a judge of a superior court is not liable for any judicial utterance, subordinate justices, sheriffs and even public prosecutors have been held liable for enforcing mandates of legislative bodies. *Kelley* v. *Bemis*, 4 Gray, 83; *Merrit* v. *St. Paul*, 11 Minn. 223; *Warren* v. *Kelley*, 80 Me. 512. A few States, however, have repudiated this doctrine. *Edes* v. *Boardman*, 58 N. H. 580; *Brooks* v. *Mangan*, 86 Mich. 576. The reasoning of this latter case was recently affirmed and applied in defence of a public officer who procured issue of process under an ordinance which the court held invalid. *Tillman* v. *Beard*, 80 N. W. Rep. 248 (Mich.).

In continental Europe the need of decisive executive action in States surrounded by enemies gave rise to a distinct system of administrative law for the protection of such officials. England, however, since freer from external pressure, developed no such system. In this country, though it is thought that the foundations are being laid for a national administrative law, as yet it has not been generally recognized. The problem of unconstitutional legislation, however, is peculiarly our own, and it may be suggested that old precedents derived from England should not prevent our working out in this case some system of administrative protection.

It would seem, moreover, that a distinction may be drawn between those early decisions and the principal case. The reason for the original doctrine that an executive officer is liable for excess of jurisdiction was the danger of abuse of official power. From unconstitutional laws, however, our danger is not abuse of process, but abuse of legislative discretion. It is, moreover, not unfair to hold that officers are bound to know the extent of their jurisdiction at common law; but to say they must know the true limits of the authority of a legislature is to demand an impossibility. The maxim that "ignorance of law excuseth no one" is here inapplicable. The officer does not rely on the statute as law, but on the statute as a fact, — as an order or declaration of a body which he is bound to obey. To reply with the fiction that such statute is as if it never had been is a confession of weakness. Overruling an act of legislature is a decision to be made with reluctance even by a co-ordinate department. It would be, therefore, highly unbecoming in a subordinate official to deny validity to a statute. To compel him to such a decision is to abandon a cardinal principle of constitutional interpretation. In view of these objections, one would think that the liability attached to officers who exceed their common law jurisdiction should not be extended in this country to express statutory additions to their jurisdiction in which the legislature has exceeded its powers.

RECENT CASES.

ADMIRALTY — BAIL — RE-ARREST OF VESSEL. — A foreign vessel was arrested in a suit *in rem*, and bail given for the value of the ship and freight. The damages assessed exceeded the bail, and on the ship afterwards coming into an English port she was re-arrested. *Held*, that in an action *in rem*, where the owners have appeared, the damages are not limited to the value of the *res* and the ship was rightly re-arrested. *The Gemma*, [1899] P. D. 285. See NOTES.

BANKRUPTCY — DISCHARGE OF JUDGMENT DEBT FOR SUPPORT OF BASTARD. — A judgment had formally been entered against the bankrupt in bastardy proceedings, brought in the name of the State, adjudging him to pay a monthly sum to the mother for the maintenance of the child. *Held*, that such a judgment debt is not released by the discharge in bankruptcy. *Re Baker*, 96 Fed. Rep. 954 (Dist. Ct., Kan.).

The Bankruptcy Act of 1898, § 63 *a*, provides more explicitly than former bankruptcy acts that "all debts of the bankrupt which are a fixed liability as evidenced by a judgment" shall be discharged. The judgment debt in the principal case is within the letter of this provision, but not within the intendment. It is well established in bankruptcy law that, however general the words of the statute, a judgment for a penalty entered in criminal proceedings is not discharged. *Re Sutherland*, Deady, 416; *Spaulding* v. *New York*, 4 How. 21. To hold otherwise would allow the bankruptcy courts to remit penalties for crimes. In the principal case the proceedings were quasi-criminal, but the same principles should apply. It could never have been contemplated that the bankruptcy courts should discharge the putative father of the continuing obligation imposed by a judgment in such proceedings. *Re Cotton*, Fed. Cas. No. 3269. And the court in the principal case is accurate in giving a limited construction to the provision in question.

BANKRUPTCY — PREFERENCES — ADVANCES UPON BOTH PAST AND PRESENT CONSIDERATION. — A creditor of an insolvent banker had $1300 on deposit with him. He then advanced $1900 more, and received in return collateral securities to the amount of $7000 for both amounts. *Held*, that as to $1300 the transaction is a preference and voidable, but as to $1900 the transfer is for a present fair consideration and valid. *Re Cobb*, 96 Fed. Rep. 821 (Dist. Ct., N. C.).

The Bankruptcy Act of 1898, § 60 *a*, provides that all preferences shall be voidable. But a transfer founded upon a present and adequate consideration is not considered a preference. *Tiffany* v. *Lucas*, 15 Wall. 421; *Clark* v. *Iselin*, 21 Wall. 360. The truly difficult question, and one on which there is a remarkable conflict of authority, arises where the security given is for both past and present advances. Many cases hold that the transaction being voidable in part must be voidable as to the whole. *Denny* v. *Dana*, 56 Mass. 160; *Tuttle* v. *Truax*, 1 Nat. Bank. Reg. 601; *Scannon* v. *Hobson*, Fed. Cas. No. 12,434. But other cases hold that the transaction is separable. *Ex parte Ames*, 1 Lowell, 561; *Re Stowe*, 6 Nat. Bank. Reg. 429; *Crampton* v. *Tarbell*, Fed. Cas. No. 3349. The former cases, however, fail to recognize the distinction between a fraudulent conveyance and a preference. Now fraud is not essential to the conception of a preference. Accordingly there is no reason why the transfer should not be separated into its voidable and valid parts, as was done in the latter cases, and the decision in the principal case is to be commended.

BILLS AND NOTES — ALTERATION — PRESUMPTION OF FRAUD. — The payee sued to recover the consideration of a note which had been materially altered while in his possession. *Held*, that there is a presumption which the plaintiff has not rebutted that the alteration is fraudulent and hence the action will not lie. *Maguire* v. *Eichmeier*, 80 N. W. Rep. 395 (Iowa).

It is well settled that a fraudulent alteration of a note by the payee extinguishes both the note and the liability for which it was given. *Smith* v. *Mace*, 44 N. H. 553; *Wheelock* v. *Freeman*, 30 Mass. 165. But there is authority for the doctrine that unless the alteration is shown to have been made with fraudulent intent the payee may recover the original consideration. *Vogle* v. *Ripper*, 34 Ill. 100. The prevailing rule, however, is stated by the principal case. *Warder Co.* v. *Willyard*, 46 Minn. 531; 2 Dan. Neg. Ins., 4th ed., § 1412. It is certainly fair to call upon the party who made the alterations for all necessary explanations, but it is unnecessary and misleading to put the rule in the form of a presumption. If a note is given on account of a debt the right of action on the debt is suspended. *Kearslake* v. *Morgan*, 5 T. R. 513. And it seems clear that if the creditor wishes to take advantage of the original liability it is for him to show that the security has become unavailable without his fault. It is simply a question of the burden of proof.

BILLS AND NOTES — NOTES OF UNREGISTERED FOREIGN CORPORATIONS. — A note was executed in Tennessee, in favor of, and as part of a transaction with, an Ohio corporation which had not complied with the statutes regulating the terms on which foreign corporations may do business in Tennessee. *Held*, that the note is unenforceable in the hands of a purchaser for value without notice. *First Nat. Bank of Marsillon* v. *Coughron*, 52 S. W. Rep. 1112 (Tenn., Ch. App.).

As the statutes in question do not expressly make such notes void, the better view is that they are enforceable by holders for value without notice. *Williams* v. *Cheney*, 69 Mass. 215. The principal case rests on a *dictum* in an earlier Tennessee case,

Snoddy v. *American Nat. Bank*, 88 Tenn. 573, that "notes given in consideration of a contract against morals, public policy, and public statutes are void in any hands," citing 2 Am. and Eng. Enc. Law, 1st ed., 368, and notes. The reference supports the position taken; but an examination of the cases cited discloses that they are all either based on statutes making the notes void, or are cases between the original parties to the transaction. The later edition of the Encyclopedia states the correct view. 4 Am. and Eng. Enc. Law, 2d ed., 192. The principal case illustrates the danger of relying on *dicta* and statements in the digests, without a careful examination of the cases.

CARRIERS — CONTRACT LIMITING LIABILITY FOR NEGLIGENCE. — *Held*, that a carrier cannot by contract limit his liability for injuries caused by his negligence to a value set by the shipper. *Cincinnati, etc. R. R. Co.'s Receiver* v. *Graves*, 52 S. W. Rep. 961 (Ky.).

Contracts purporting to limit, to an agreed valuation, the liability of the carrier for losses occurring through his negligence appear to fall into three classes. First, where the carrier prints in his bill of lading a limit to the liability assumed. Such stipulations are generally held to be against public policy and void. *Black* v. *Goodrich Transportation Co.*, 55 Wis. 319. Second, where the liability is limited to a certain sum, unless a higher value is stated by the shipper. Here, the authorities are in conflict, but the weight, perhaps, is that the carrier cannot limit his liability by the mere inaction of the shipper. *Southern Exp. Co.* v. *Seide*, 67 Miss. 609. Third, where, as in the principal case, the shipper sets a value which is written into the bill of lading. Here, clearly, there is no reason in public policy against the contract, as the shipper is not at a disadvantage in his dealing with the carrier. The agreement is virtually one for liquidation of damages, and should be enforced. *Harvey* v. *Terre Haute, etc. R. R.*, 74 Mo. 538.

CONSTITUTIONAL LAW — RESTRICTION OF HEIGHT OF BUILDINGS. — *Held*, that a statute, setting a limitation upon the height of buildings, adjoining a certain public park, and providing for compensation to property owners affected, is not unconstitutional. *Attorney-General* v. *Williams*, 55 N. E. Rep. 77 (Mass.). See NOTES.

CONTRACTS — STATUTE OF FRAUDS — SPECIFIC PERFORMANCE — Under an oral contract for the purchase of land the defendant entered into possession, paid the purchase price, and made permanent improvements. *Held*, that the case is within the Statute of Frauds, and equity will not give specific performance of the contract. *Pass* v. *Brooks*, 34 S. E. Rep. 228 (N. C.).

Although the Statute of Frauds is binding on courts of equity, it is the general rule that entry into possession and payment of purchase-money under an oral contract for the sale of land is such part performance as will entitle the purchaser to specific performance. *Green* v. *Jones*, 76 Me. 563; *Fitzsimmons* v. *Allen's Admr.*, 39 Ill. 440; Browne, Stat. Fr., 5th ed., § 465. And where courts of equity recognize exceptions to the statute the erection of valuable improvements by the purchaser is decisive in his favor. *Potter* v. *Jacobs*, 111 Mass. 32; *Littlefield* v. *Littlefield*, 51 Wis. 23. The principal case represents the law of North Carolina, Mississippi, and Tennessee, the purchaser's remedy being confined to restitution of the purchase-money and compensation for improvements. *Ellis* v. *Ellis*, 1 Dev. Eq. 341; *Ridley* v. *McNairy*, 2 Humph. 174; *Box* v. *Stanford*, 21 Miss. 93. That such a rule will often fail to do justice between the parties seems obvious, and the results of the prevailing doctrine are far more satisfactory, though usually not reached without some violence to the words of the statute.

CORPORATIONS — MISREPRESENTATION IN PROSPECTUS — RESCISSION OF CONTRACT. — The defendants formed the plaintiff company and caused themselves to be elected sole directors for the purpose of buying certain nitrate grounds belonging to themselves. The prospectus gave notice of this fact but was misleading as to important particulars. The defendants greatly overcharged the company, which, in ignorance thereof, worked out but a small portion of the deposit. *Held*, that the plaintiff cannot rescind the contract. *Laguras Nitrate Co.* v. *Laguras Syndicate*, [1899] 2 Ch. D. 392.

Because of the misrepresentation contained in the prospectus the plaintiffs would have been entitled to rescind the contract before the land had been worked. A trustee or agent cannot bind his principal in a contract with himself unless he has made a full disclosure of all the facts he knows concerning the subject matter. *Ex parte Lacey*, 6 Ves. 625; *Wardell* v. *Union Pacific R. R.*, 103 U. S. 651. But the court, in the principal case, held that the plaintiff could not succeed because the land had been worked, and it was therefore impossible to restore the parties to their original position. The principle invoked, however, is not an absolute bar to rescission, but merely a rule by which it is determined in the first instance whether such a remedy is just. And if substantial justice will be attained, the relief sought should be given though the

parties are not restored to their original position. *Erlanger* v. *New Sombrero Phosphate Co.*, L. R. 3 App. Cas. 1278. Hence the opinion of a dissenting judge in the principal case seems preferable. Practical justice would be done if the defendants were put in the same position as if they had worked the land themselves. The plaintiff should then be given a decree for the purchase price of the land less the profits the company made in working it.

CORPORATIONS — STOCKHOLDER'S RIGHT TO INSPECT CORPORATE RECORDS. — The relator, a stockholder, applied for a writ of *mandamus* to compel the defendant corporation to allow her to inspect its records, alleging that she was desirous of learning the condition of the company and the manner in which it had been managed. *Held*, that a *mandamus* is properly granted. *State* v. *Pacific Brewing, etc. Co.*, 58 Pac. Rep. 584 (Wash.).

The English courts, in the absence of statutory provisions, confine the right of a stockholder to inspect corporate records to cases in which there is a dispute pending between himself and the corporation, or other stockholders, or where the purpose of the inspection is to ascertain whether he can raise a particular case in his favor. *Rex* v. *Merchant Tailors Co.*, 2 B. & Ad. 115. The objection to a more general right is that frequent examinations might interfere with the successful conduct of the business of the company. The English rule has been approved in some American jurisdictions. *Commonwealth* v. *Phœnix Iron Co.*, 105 Pa. St. 111; *People* v. *Walker*, 9 Mich. 328. The general tendency of our courts, however, is to permit the greatest freedom of inspection, placing practically no limit upon the right other than that the purpose shall not be the mere gratification of curiosity. *Martin* v. *Bienville Oil Works*, 28 La. An. 204. And when it is remembered that the most effectual remedy for mismanagement in large corporations is danger of exposure, and that the court can so regulate the mode of inspection as to avoid all practical objections to it, the doctrine of the principal case seems unexceptionable.

CORPORATIONS — ULTRA VIRES — PERFORMANCE BY THE PLAINTIFF. — In answer to a bill for the specific performance of a contract which the plaintiff had performed on his part, the defendant corporation set up the defence of *ultra vires*. *Held*, that this is a good defence. *National Home, etc. Assn.* v. *Home Savings Bank*, 54 N. E. Rep. 619 (Ill.). See NOTES.

CRIMINAL LAW — VIOLATION OF STATUTE — NECESSITY. — A statute, containing certain exceptions, prohibited carrying to church any intoxicating liquors. By a physician's directions the defendant carried whiskey to church to be used by his wife as a medicine. *Held*, that the defendant is liable under the statute. *Rice* v. *State*, 34 S. E. Rep. 202 (Ga.).

If, under circumstances which allow no possibility of choice, one is compelled to do a prohibited act, he is not punishable, for no crime has been committed. *Commonwealth* v. *Brooks*, 99 Mass. 434. Clearly this was not the principal case. But, in addition, it is generally held that where it is necessary to do the act prohibited in order to prevent great harm to particular persons, the commission of the act will be excused on grounds of public policy, unless the rights of an individual have been infringed. *State* v. *Wray*, 72 N. C. 253; *Brig William Gray*, 1 Paine, 16; *Nixon* v. *State*, 76 Ind. 524. In the principal case, however, a choice was not forced between a violation of the statute and endangering the life of the wife. The defendant, by going to church, voluntarily took the first step, and hence should not be allowed to claim that he was forced to break the statute in order to protect his wife. The view of the principal case is undoubtedly sound.

DAMAGES — GRATUITOUS BAILMENT — TROVER. — The plaintiffs were gratuitous bailees of goods which the defendants converted, there being no negligence on the part of the plaintiffs. *Held*, that the measure of damages is the value of the property converted. *Guttner* v. *Pacific Steam Whaling Co.*, 96 Fed. Rep. 617 (Dist. Ct., Cal.).

The great weight of authority is in accord with the rule in the principal case. *Burton* v. *Hughes*, 2 Bing. 173; Suth. Dam., 2d ed., § 1136. It has been held, however, that the bailee is entitled to no damages when he has suffered no loss. *Claridge* v. *South Staffordshire Tramway Co.*, [1892] 1 Q. B. D. 422; *Lockhart* v. *Western, etc. R. R.*, 73 Ga. 472. The latter cases seem preferable. The bailor, where the bailment is gratuitous, can, in an action of trover against the convertor, recover the full value of the property. *Smith* v. *Sheriff of Middlesex*, 15 East, 607. And if the bailee in such a case recovers the full value of the goods he has gained no advantage for himself but must hold the entire sum for the benefit of the bailor. *Hays* v. *Riddle*, 1 Sandf. 248; 2 Sedg. Dam., 7th ed., 394. The view in the principal case thus occasions two suits in order to do full justice, where only one is really necessary. For this reason the courts might well bar all recovery by the bailee in order to prevent circuity of action.

EVIDENCE — CONFESSION OBTAINED BY TRICK. — The defendant confessed to murder, having been falsely led to believe that the knife with which he had committed the murder had been found. *Held*, that the confession is admissible. *Commonwealth* v. *Cressinger*, 44 Atl. Rep. 433 (Pa.).

The general rule is that a confession is admissible unless it has been caused by actual duress or by any inducement, threat, or promise, proceeding from a person in authority and having reference to the charge against the accused person. Steph. Dig. Ev. art. 21. Hence the mere fact that the confession was obtained by a trick or a false statement should not exclude it, though it might affect its weight. *Minnesota* v. *Staley*, 14 Minn. 105; *State* v. *Phelps*, 74 Mo. 128. Notwithstanding, the case of *Bram* v. *United States*, 168 U. S. 532, held inadmissible a confession induced by a statement made to the accused that he had been seen committing the crime, on the ground that the prisoner was unduly influenced. See 11 HARV. LAW REV. 408. In refusing to follow that decision, the present case is supported by the weight of authority, although of late the courts have shown a tendency to be more lenient to the accused. *People* v. *Barker*, 60 Mich. 277; *Commonwealth* v. *Myers*, 160 Mass. 530.

EVIDENCE — HEARSAY — DECLARATIONS OF INTENTION. — In an action to recover for loss of cattle while in transit, a statement of the engineer, made while the cattle were being loaded, that he would kill them before they reached a certain point, was introduced. *Held*, that the statement is admissible as the declaration of an agent within the scope of his authority. *Crawford* v. *Southern Ry. Co.*, 34 S. E. Rep. 80 (S. C.).

The court got rid of the objection of hearsay on the ground that the admissions of an agent within the scope of his authority are the admissions of the principal and so not hearsay. The correctness of this proposition cannot be doubted. *Fairlie* v. *Hastings*, 10 Ves. 123; *United States* v. *Golding*, 12 Wheat. 460. But the assertion that the admission in the principal case was within the scope of the engineer's authority may well be disputed. Although this reason fails, the result reached can be justified on other grounds. An exception to the rule against hearsay admits contemporaneous declarations bearing upon the intention of the declarant. *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285; *Commonwealth* v. *Trefethen*, 157 Mass. 180. The statements here were contemporaneous and so come within the above exception, and were rightly admitted.

EVIDENCE — LIBEL — PRIVILEGE. — The cashier of a bank holding a note for collection endorsed on the note "Never signed a note; fraud, forgery," meaning to give notice to the holder's agents in the customary way of the payor's reason for refusing payment. *Held*, that the communication is privileged. *Caldwell* v. *Story*, 52 S. W. Rep. 850 (Ky.). See NOTES.

INDIANS — TRIBAL LAW. — *Held*, that the right of inheritance in land of a member of an Indian tribe whose tribal organization is still recognized by the government is controlled by the law of the tribe. *Jones* v. *Meehan*, 20 Sup. Ct. Rep. 1. See NOTES, 13 HARV. LAW REV. 298.

INSURANCE — WAIVER — CLAUSE OF INCONTESTABILITY. — The holder of an insurance policy had not an insurable interest, but the policy contained a provision that the same should be incontestable after the lapse of a year. In an action on the policy at the expiration of a year, *held*, that the holder cannot recover. *Anctil* v. *Manufacturers' Life Ins. Co.*, [1899] App. Cas. 604.

Public policy and expediency require that the assured should have an insurable interest in the thing insured. *Goddart* v. *Garrett*, 2 Vern. 269. Hence the insurer cannot waive a defence founded on the lack of such an interest on the part of the policy holder. *Agricultural Ins. Co.* v. *Montague*, 38 Mich. 548. Moreover, it has been held that a provision of incontestability amounts to a waiver in advance of all defences that the company can waive, *Massachusetts Benefit, etc. Co.* v. *Robinson*, 104 Ga. 256, and it seems fair to say that it should leave open all others. On these grounds the principal case deserves to be supported. It has been held, however, that the only effect of a clause of incontestability like that in the principal case is to establish a short period of limitation for setting up all kinds of defences, and that one who has not an insurable interest may recover after the period expires. *Wright* v. *Mutual, etc. Assn. of America*, 118 N. Y. 237. But, obviously, such a view leads to the sanction of wager policies and allows the general principles of public policy and expediency to be defeated by the private arrangement of the parties.

PARTNERSHIP — DEATH OF PARTNER — SPECIAL PARTNERSHIP. — At the death of one of two partners his executor, without his authority, consented to a continuance of the business by the surviving partner. The latter subsequently became insolvent.

Held, that the debts contracted in the business since his partner's death, his own individual debts, and the claim of the executor for the share of the deceased are to be satisfied *pari passu* from the assets of the business. *Dexter* v. *Dexter*, 60 N. Y. Supp. 371 (Sup. Ct., App. Div., Fourth Dept.).

Although the executor in the above case had no legal right to allow his testator's assets to remain in the business, it must be admitted that a special partnership was in fact formed as to third parties, since the executor's power over the assets is absolute. 1 Woerner, Administration, 387. The subsequent creditors of the business should, therefore, have the first claim to the firm assets, *Hoyt* v. *Sprague*, 103 U. S. 613, 624, the same as when the continuance of the business has been authorized by the testator. *Adams & Co.* v. *Albert*, 155 N. Y. 256; *Burwell* v. *Mandeville's Exec.*, 2 How. 560. Of the surplus the executor should be entitled to the proportionate share of the deceased partner, and the share of the survivor alone should be applicable to the payment of his separate debts, since a creditor is entitled to no greater interest than his debtor owns. *Matter of Smith*, 16 Johns. 102; *Brown's Appeal*, 89 Pa. St. 139. The present decision is opposed to the result reached by the application of sound and established principle.

PERSONS — ALIENATION OF AFFECTION — SUIT BY WIFE. — *Held*, that mere alienation of the husband's affections does not constitute a cause of action for the wife, but there must be also a loss of the *consortium*. *Neville* v. *Gile*, 54 N. E. Rep. 841 (Mass.); *Houghton* v. *Rice*, 54 N. E. Rep. 843 (Mass.).

These decisions apparently require an actual separation of the husband from the home before the wife's cause of action accrues. Since the passage of statutes allowing married women to sue alone, there seems to be no reason why the wife's rights against third parties for interference with the marriage relations should not be equally extensive with those of the husband. This view is taken by the great weight of authority. *Foot* v. *Card*, 58 Conn. 1; *Bennett* v. *Bennett*, 116 N. Y. 586. It has been held in several jurisdictions that a husband may maintain an action for the mere alienation of his wife's affections without her separation from the home. *Herrmance* v. *James*, 47 Barb. 120; *Rinehart* v. *Bills*, 82 Mo. 534. The justice of these decisions can hardly be doubted, for the personal injury to the husband or wife and the violation of the security of the family relations may be just as great when the discordant element remains, as when he or she abandons the home. The principal cases appear then to be against the better policy and opposed to the trend of modern authorities. See 1 Bish. Mar. Div. and Separ. § 1361.

PROCEDURE — EFFECT OF JUDGMENT AGAINST GARNISHEE. — The plaintiff obtained judgment against the defendant and also against a garnishee in the same action. The defendant, having paid into court the difference between the judgment against the garnishee and that against himself, *held*, that he is entitled to have the judgment against himself discharged as satisfied. *Bowen* v. *Port Huron Co.*, 80 N. W. Rep. 345 (Iowa).

The proposition by which it is sought to support this questionable result is in effect that the judgment against a garnishee is equivalent to a levy on the defendant's property. Even admitting this to be true, it does not justify the decision reached, for while a levy on property sufficient to satisfy the debt may operate to suspend further remedies while it is in force, it is nowhere held that it extinguishes the judgment. *First Nat. Bank of Hastings* v. *Rogers*, 13 Minn. 407; 2 Freem. Judg., 4th ed., § 475. To approach the question from another standpoint, clearly it was never intended that garnishment statutes should force the party who takes advantage of them to accept the liability of some third person as a substitute for that of his debtor. The judgment against a garnishee is in the nature of collateral security for the satisfaction of the principal's obligation. It is subordinate and incidental to the judgment against the defendant, and it is difficult to find any principle by which it could become a ground for discharging his liability. *Roberthon* v. *Norroy*, 1 Dyer, 83; 1 Freem. Judg., 4th ed., § 228.

PROPERTY — CONDITIONS — RULE AGAINST PERPETUITIES. — In 1726 H. by lease and release conveyed property to trustees upon trusts for a hospital. The release contained a proviso that if the premises should be used for any other purposes they were to revert immediately to the right heirs of H. *Held*, that this is a common law condition subsequent, and as such is void as a perpetuity. *In re The Trustees of Hollis, etc., Contract*, [1899] 2 Ch. D. 540. See NOTES.

PROPERTY — COPYRIGHT — SHORTHAND REPORTS. — The plaintiff brought an action to restrain the defendant from selling a book which contained public speeches taken from shorthand reports published in the plaintiff's newspaper. *Held*, that the plaintiff can claim no copyright in such reports. *Walter* v. *Lane*, 68 L. J. Ch. 736 See NOTES.

PROPERTY — DEEDS — RESERVATIONS. — A conveyed to B a tract of land bordering on a river, reserving, without words of limitation, the right of building a dam across the river and the right of flowage caused thereby. In an action by the heir of A, *held*, that the easement reserved must be construed as excepted from the grant, and that therefore words of limitation are unnecessary. *Smith* v. *Furbish*, 44 Atl. Rep. 398 (N. H.). See NOTES.

PROPERTY — LATERAL SUPPORT — DAMAGES. — A wharf on the plaintiff's land, which did not increase the lateral support required of the adjoining land, was injured by the digging away of such land. *Held*, that the plaintiff may recover for the injury both to his soil and his wharf. *White* v. *Tebo*, 60 N. Y. Supp. 231 (Sup. Ct., App. Div., Second Dept.).

It is universally held that the owner's natural right to have his land supported extends only to the land in its unimproved state. But admitting that the land in its natural state would have fallen, there is a conflict of authority as to whether the damages should include incidental injury to structures thereon. In England and one or two of the states the rule of the principal case is followed. *Brown* v. *Robins*, 4 H. & N. 186; *Stearns' Exec.* v. *City of Richmond*, 88 Va. 992. In a majority of the States, however, damages are recoverable merely for the injury to the soil, unless the injury to the structure was caused by negligence. *Gilmore* v. *Driscoll*, 122 Mass. 199; *McGuire* v. *Grant*, 25 N. J. Law, 356; *Richardson* v. *Vermont Central R. R. Co.*, 25 Vt. 465. The doctrine established in the latter cases is preferable, although, as a matter of legal principle, no decided advantage can be claimed for it. Public policy, however, is better served, if improvements to land are not unduly discouraged, by forcing on the owner who desires to excavate an absolute liability with regard to structures on his neighbor's land.

PROPERTY — PERCOLATING WATERS — ABSORPTION BY WATERWORKS. — The defendant, by building extensive waterworks drew off the percolating waters which fed a natural stream on the plaintiff's land, causing it to dry up. *Held*, that the defendant is liable for the damage done. *Smith* v. *City of Brooklyn*, 54 N. E. Rep. 787 (N. Y.).

The case establishes the law in New York that the enjoyment of percolating waters is not an absolute right. Although the court confines its decision to the exact facts of the case, the logical outcome of abandoning the doctrine of absolute ownership in percolating waters would seem to lead to the result reached in *Bassett* v. *Salisbury Mfg. Co.*, 43 N. H. 569, that the right to use such waters should be restricted to reasonable limits. This comes nearer to practical justice than any other view. By the right of authority, however, absolute ownership in percolating waters is recognized. *Chasemore* v. *Richards*, 7 H. L. Cas. 349; *Chatfield* v. *Wilson*, 28 Vt. 49. See 13 HARV. LAW REV. 151.

PROPERTY — WILLS — ATTESTATION. — Under a statute requiring wills to be attested by two witnesses, *held*, that it is not essential that the testator sign first, if his signature and the attestation form part of the same transaction. *Gibson* v. *Nelson*, 54 N. E. Rep. 901 (Ill.).

In England it is well settled that an attempted attestation before the will is signed by the testator is void. *Goods of Olding*, 2 Cur. Ecc. 865; *Goods of Byrd*, 3 Cur. Ecc. 117. In this country the English rule is followed by the majority of courts. *Sisters of Charity* v. *Kelly*, 67 N. Y. 409; *Chase* v. *Kittredge*, 93 Mass. 49. But the doctrine of the principal case is not without support. *O'Brien* v. *Gallagher*, 25 Conn. 229; *Rosser* v. *Franklin*, 6 Grat. 1; 1 Red. Wills, 226. However desirable it may be to give effect to the clear intention of the testator, the plain words of the statute should not be disregarded. This seems to have been done in the above decision, for it is in strictness an impossibility for any person to witness the future act of another, although it is so nearly contemporaneous as to be part of the same transaction. *Brooks* v. *Woodson*, 87 Ga. 379. On principle, then, as well as on authority the principal case seems questionable.

PROPERTY — WILLS — TESTAMENTARY CAPACITY. — *Held*, that the test of testamentary capacity is the ability of the testator to understand the nature and elements of the transaction in which he is engaged, at the time when he executes the will. *Appeal of Turner*, 44 Atl. Rep. 310 (Conn.).

Testamentary capacity was formerly a question of sanity. *Smith* v. *Tebbitt*, L. R. 1 P. & D. 398. A modern rule requires ability to make a contract. *Stewart* v. *Elliott*, 2 Mackey, 304. Still another test employed is the ability of the testator to transact ordinary business. *Meeker* v. *Meeker*, 75 Ill. 262. The weight of authority, however, supports the test laid down in the principal case. *Whitney* v. *Twombley*, 136 Mass. 145; *St. Leger's Appeal*, 34 Conn. 434; *Waddington* v. *Buzby*, 45 N. J. Eq. 173. This is the most logical and satisfactory view. It may be that a partially insane person can make a

will; and then again that a sane though weak-minded person cannot. A will is neither a contract, nor general business, and a man's capacity to do one particular thing cannot properly be determined by his ability in some other direction.

PUBLIC OFFICERS — LIABILITY FOR PUBLIC MONEYS. — A county treasurer deposited public funds in a bank, which subsequently failed. In an action on the official bond, *held*, that the obligors are liable irrespective of the treasurer's negligence. *Lamb* v. *Dart*, 34 S. E. Rep. 160 (Ga.).

This decision accords with the great weight of authority in holding that a public officer is subject to a stricter accountability than an ordinary bailee, and that the use of due care will not excuse him or his sureties for the loss of public moneys. *United States* v. *Prescott*, 3 How. 577; *Lowry* v. *Polk County*, 51 Iowa, 50; *Tillinghast* v. *Merrill*, 151 N. Y. 135. *Contra*, *Cumberland County* v. *Pennell*, 69 Me. 357. This view is based upon considerations of public policy, and seems justifiable in view of the great importance that public officers faithfully perform their duties. See 10 HARV. LAW REV. 126, 386; 11 HARV. LAW REV. 271.

SURETYSHIP — RELEASE OF EXECUTION — DISCHARGE OF SURETY. — A creditor obtained judgment against the principal debtor and sureties, and levied on personal property of the principal sufficient to satisfy the judgment. In a later proceeding, to which the sureties were not parties, the property was released. *Held*, that the sureties are discharged. *Atnip* v. *Tennessee Mfg. Co.*, 52 S. W. Rep. 1093 (Tenn., Ch. App.).

In Tennessee a levy on personal property vests the title in the officer making it, and, if the property seized is sufficient to satisfy the demand, the levy is in law a satisfaction of the judgment. *Evans* v. *Barnes*, 2 Swan, 292; *Pigg* v. *Sparrow*, 3 Hayw. Tenn. 144. The application of this anomalous doctrine seems to have been abandoned in cases where the property levied on has been released, and in such cases it is held that the levy does not amount to a satisfaction. *Telford* v. *Cox*, 15 Lea, 298. But as to whether the surety is bound in the latter case the Tennessee decisions differ. To the effect that he is discharged is *Sypert* v. *Frazier*, 1 Tenn. Cas. 557. The court, however, reached the opposite result in *Fry* v. *Manlove*, 1 Baxt. 256. If the levy, where there is a subsequent release, is no satisfaction of the principal debtor's obligation it is difficult to see why it should discharge the surety. The latter clearly has no legal defence against the creditor, and there seems to be no ground for raising an equitable defence in his favor. Therefore, with cases on either side, the decision of the principal case is to be regretted.

TORTS — FALSE IMPRISONMENT — JUSTIFICATION UNDER VOID LAW. — The defendant had procured the arrest of the plaintiff under an ordinance afterwards held void. *Held*, that the defendant is not liable for false imprisonment. *Tillman* v. *Beard*, 80 N. W. Rep. 248 (Mich.). See NOTES.

TORTS — RIGHT TO PRIVACY. — A cigar manufacturer used the name and likeness of a deceased person as a label for a brand of cigars. *Held*, that equity will not restrain this use, unless it amounts to a libel, though the deceased may not have been a public character. *Atkinson* v. *Doherty*, 80 N. W. Rep. 285 (Mich.).

This is the first American decision squarely involving the so-called right to privacy, to the support of which the law seemed at one time to be tending, and after a full discussion of the subject, it refuses to admit the existence of that right. It is in accord with a late English authority. *Dockrell* v. *Dougall*, 78 L. T. Rep. 840; see 12 HARV. LAW REV. 207. Together, these cases make it improbable that any court will in the future rest a decision on this ground. If the subject is to be treated at all, therefore, it is handed over to the legislatures, and, on principle, perhaps this is the desirable result.

TORTS — UNRECORDED MORTGAGE — SALE BY MORTGAGOR. — The defendant secured a debt to the plaintiff by a bond and mortgage on certain land. The mortgage was not recorded, and the defendant sold the premises to a third party without notice. *Held*, that an action of tort lies for the destruction of the plaintiff's security. *Conley* v. *Blinebry*, 60 N. Y. Supp. 531 (Sup. Ct., Special Term).

This case is novel in the form of the remedy employed, but on principle a valid objection to it cannot be raised. Clearly, the defendant in thus deliberately depriving the plaintiff of his lien upon the land has done a wrongful act, for which he should answer in damages. However permissible in theory, this form of action will not always prove valuable in practice, for the plaintiff has lost his security only, and not his debt, and if the defendant is solvent his damages will be merely nominal. But where the defendant has become bankrupt the creditor may well resort to this action, and thus have two claims upon the assets. For a discussion of an analogous line of cases, see 1 HARV. LAW REV. 7.

TRUSTS — DEPOSIT OF CHECK FOR COLLECTION — LIABILITY OF BANK. — The plaintiff deposited for collection with the defendant bank a check on another bank against which the defendant allowed him to draw. The check was lost in the clearing house before collection. *Held*, that the defendant is liable as debtor for the amount of the check. *Walton* v. *Riverside Bank*, 60 N. Y. Supp. 519 (Supp. Ct., App. Term).

When negotiable paper is deposited with a bank for collection the bank is regarded by the great weight of authority as a mere agent, and does not become a debtor till the paper is paid. *Scott* v. *Ocean Bank*, 23 N. Y. 289; *Phœnix Bank* v. *Risley*, 111 U. S. 125. It does not seem that the additional fact in the principal case, where the depositor was allowed to draw against the check before collection, should alter the relation of the parties. Such a permission is extended as a courtesy, and the transaction really amounts to a loan by the bank on the security of the check. The authorities, however, are about equally divided. In agreement with this line of reasoning is *Balbach* v. *Frelinghuysen*, 15 Fed. Rep. 675 (Cir. Ct., N. J.). *Contra*, *Hoffman* v. *First National Bank*, 46 N. J. Law, 604. The view in the principal case results in making the defendant a guarantor not only of the safety of the check while in his possession or that of his agents, but also of its collectibility. Such an extreme liability should hardly in reason be imposed as a result of the nature of the transaction. *Gaden* v. *New Foundland Savings Bank*, [1899] App. Cas. 280; *Moors* v. *Goddard*, 147 Mass. 287.

REVIEWS.

A TREATISE ON CRIMINAL PLEADING AND PRACTICE. By Joseph Henry Beale, Jr. Boston: Little, Brown & Co. 1899. pp. xli, 400.

This latest addition to the Student Series is, as most of the preceding volumes have been, a practical book in the best sense of the word, both for the student and the practitioner. Leaving to one side the minor details of practice that depend solely on local arrangements, the book deals with the general principles of modern criminal pleading. While the book is thus devoted to a statement of the law as it is to-day, it is more than a mere annotated digest. When the point of law under discussion is clear as to its underlying principles, the illustrations and variants are stated in as concise a form as possible. Where, on the other hand, the principle is not clear, or there is a conflict in the decisions, the reason for the law, or an intimation as to which of the decisions is the sounder, is given with sufficient fulness to set the reader on the right track. Thus in the chapter on Burden of Proof the distinction is made clear between insanity, which is really a negative defence and hence one that does not shift the burden of establishing to the defendant, and a truly affirmative plea as self-defence or former jeopardy, where the burden should so shift. While the correctness on principle of these views is shown, it is also pointed out that in the case of insanity the courts are almost evenly divided, and in the case of self-defence they are almost unanimous in keeping the burden on the prosecution. Throughout the treatise citations, while rarely merely cumulative, are always given for every statement of law, and chosen from the whole field of both English and American decisions.

The subject-matter is divided into four parts with appropriate chapters. Starting with the first question that would naturally arise, that of jurisdiction and venue, the author proceeds through the various steps of the accusation and trial to the question of pardon and other bars to execution. Not the least interesting part of the work is that which discusses the present forms of indictment. Professor Beale points out that the reason for the present cumbersome and wordy forms is in large part historical, that the really necessary parts of the indictment, even when the need for